fail if attempted: as demonstrated in my original Statement filed in these proceedings, recent Supreme Court commercial speech decisions make it abundantly clear that government may not discriminate against commercial speech merely because it is "commercial," or out of the generalized distaste for "commercialism," "consumerism," or "materialism" that is manifest in the CSC Comments.[4]

III. The CSC Comments Cannot Be Squared With the Core Values of the First Amendment or our Constitutional System.

The CSC Comments contain no serious discussion of the First Amendment. The CSC Comments are instead largely a collage of anecdote and bare assertion, attacking everything from the appearance of Nintendo games on "Growing Pains"[5] to commercial sponsorship of the Olympics and college football bowl games.[6] The CSC Comments are cast as if the Commission were free to

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necessary" prong of the test was to be understood as a "reasonableness" standard), continues to govern commercial speech doctrine, and as discussed in my original Statement in these proceedings, often results in governmental regulation of commercial speech being struck down. See Statement of Rodney A. Smolla at 9-18.

[4] See City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505 (1993); Edenfield v. Fane, 113 S. Ct. 1792 (1993). These and other contemporary commercial speech cases, discussed in detail in my original Statement, clearly establish the proposition that the First Amendment forbids discriminating against commercial speech unless that discrimination is justified by palpable evidence of harm caused by that speech. The government may not treat commercial speech less favorably than non-commercial speech merely because it is "commercial," without more. See Statement of Rodney A. Smolla at 9-18.

[5] CSC Comments at 12.

[6] CSC Comments at 12.

regulate in a milieu in which the First Amendment did not exist.

The First Amendment does, however, exist, and the policy goals of the CSC Comments cannot be squared with the First Amendment, or with the core assumptions of our constitutional system concerning the appropriate role of government. Thus, not only are the CSC Comments seemingly oblivious to the learning of recent commercial speech decisions, they ignore the central tenets of modern First Amendment jurisprudence writ large. For at bottom, they are grounded in the conviction that it is appropriate for the government to regulate the First Amendment marketplace in a manner designed to impose on all the value choices of some.

Unquestionably, many Americans believe that our society is too materialistic. Many Americans believe that our society would be better off if we emphasized spiritual well-being more and material well-being less. They may be right.

Our Constitution, however, created a secular government that is forbidden to enter these precincts, and "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . ."[7] This is the essence of our commitment to an open culture.

To put the matter quite bluntly, it is simply inconceivable, under the current state of First Amendment doctrine and policy, that the courts would permit the Federal Communications

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[7] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (Jackson, J.).

Commission to discriminate against commercial programming on the theory that the Commission wishes to encourage Americans to be less materialistic. A central canon of modern First Amendment jurisprudence is that the one thing the government may not do is regulate speech because it "sells" a lifestyle, fantasy, ethos, identity, or attitude that happens to be regarded by some as socially corrosive.[8]

Americans of good will might well disagree on whether "materialism" or "consumerism" is good or bad for the country. Contrary to the ideology that informs the CSC Comments, many might think that commerce is the lifeblood of the nation, that in the modern world marketplace our robust entrepreneurial spirit is essential to survival, or even that the relatively high standard of living that our vigorous commercial marketplace has produced

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[8] At the core of modern First Amendment jurisprudence there lies the elemental proposition that an intent to stifle a message because of disagreement with it simply cannot be reconciled with the Constitution. See, e.g., R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2548 (1992) ("The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content."); Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); United States v. Eichman, 496 U.S. 310 (1990) (same); Hustler Magazine v. Falwell, 485 U.S. 46, 55-56 (1988) (refusing to allow a public figure to maintain a cause of action for intentional infliction of emotional distress arising from a vulgar satire); Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) ("the First Amendment forbids the government from regulating speech in ways that favor some viewpoints or ideas at the expense of others."); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) ("the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view").

actually gives individuals more time to spend on family, friends, religion, the arts, education, or any of the hundreds of other things that might be thought the core of what makes life worth living.[9]

The essential matter is that from the First Amendment's perspective, whether the "too much commerce is bad" forces or the "you can never have too much commerce" forces have the better argument is beside the point. The point is, the government is not permitted to choose sides.

These kinds of value choices are personal and subjective, inextricably wrapped up in individual tastes, habits, and moral sensibilities. When the newspaper arrives in the morning, some read the front pages, others turn to sports, or stock market

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[9] Indeed, our First Amendment jurisprudence recognizes that the marketplace of ideas and the commercial marketplace are often intertwined. That a particular form of speech is motivated by a desire for profit is not enough, either in First Amendment doctrine or theory, to disqualify it from constitutional protection. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976) ("[S]peech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. . . . Speech likewise is protected even though it is carried in a form that is "sold" for profit.") (citing Buckley v. Valeo, 424 U.S. 1 (1976)); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973); Smith v. California, 361 U.S. 147 (1959); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 111 (1943).

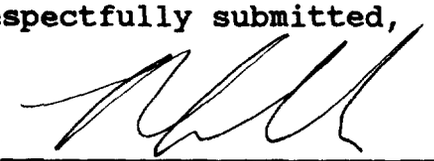
quotes, or the fashion section, or the want ads, or grocery store coupons. When the television or radio is turned on, some seek out news, some education, some sports, some cartoons, some home shopping. Every station cannot be PBS or NPR. That is not the culture we live in. It is not a culture the First Amendment permits the government to impose.

IV. Conclusion

The comments submitted in this proceeding clearly demonstrate that no palpable harms of any kind are presented by programming in the home shopping format. Rather, antipathy toward that format comes from generalized distaste for commercial speech and advertising, a distaste driven by an ideological preference Under the First Amendment, such preferences are not an appropriate basis for discriminating against the home shopping format.

For the forgoing reasons, the FCC should decline return to the pre-1984 regime, adopting regulations that would discriminate against home shopping format programming.

Respectfully submitted,



By_____

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